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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8 David F. Thompson,
9

10 Plaintiff,

11 vs.

12 Michael Astrue, Commissioner of Social
13 Security,

14 Defendant.

No. CV-11-00174-TUC-FRZ (CRP)

REPORT AND RECOMMENDATION

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16 Plaintiff David Thompson seeks judicial review of the administrative decision
17 denying his application for social security benefits. Doc. 1. He filed an amended
18 complaint on March 25, 2011. Doc. 5. More than five months later, on September 6,
19 2011, Plaintiff filed a copy of a waiver of the service of summons he had completed.
20 Doc. 13.

21 In an order dated November 30, 2011, the Magistrate Judge explained to Plaintiff
22 that a waiver of the service of summons is a document to be completed by the defendant
23 if he were to agree to waive service, and that the waiver Plaintiff completed and filed
24 does not show he has effectuated proper service on Defendant. Plaintiff was directed to
25 Rule 4 of the Federal Rules of Civil Procedure, specifically, Rule 4(m)'s requirement that
26 service be completed within 120 days and Rule 4(i)'s procedures for serving process on
27 an officer of the United States. Plaintiff was given until January 6, 2012 to effectuate
28 service. He was explicitly warned that failure to do so may result in dismissal of the

1 case. He was further warned that his failure to prosecute the action or comply with the
2 rules or any Court order may result in the dismissal of the action with prejudice. Doc. 15.

3 To date, Plaintiff has filed no affidavit or other document showing he has served
4 process on Defendant as required by Rule 4 and the order dated November 30, 2011. For
5 reasons stated below, the Magistrate Judge recommends that, after its independent
6 review, the District Court dismiss this action without prejudice.

7 **I. Discussion.**

8 Rule 4(m) provides that where a defendant is not served within 120 days after the
9 complaint is filed, the Court, unless the defendant shows good cause for his failure, must
10 dismiss the action without prejudice. Plaintiff has not shown good cause for his failure to
11 timely effectuate service on the Commissioner and the United States as required by
12 Rule 4(i). Pursuant to Rule 4(m), this action should be dismissed.

13 In addition to Rule 4(m), the Magistrate Judge has considered this Circuit's five-
14 part test to determine whether a dismissal sanction is just where the plaintiff fails to
15 comply with the rules or an order of the court. Those factors are (1) the public's interest
16 in expeditious resolution of the litigation, (2) the court's need to manage its docket,
17 (3) the risk of prejudice to the opposing party, (4) the public policy favoring disposition
18 of cases on their merits, and (5) the availability of less drastic sanctions. *See Valley*
19 *Eng'rs, Inc. v. Elec. Eng'g Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998); *Ghazali v. Moran*,
20 46 F.3d 52, 53 (9th Cir. 1995).

21 Considering this five-factor test, the Magistrate Judge concludes that dismissal
22 without prejudice is appropriate. The public's interest in expeditious resolution of
23 litigation and the Court's need to manage its docket require action when a plaintiff
24 refuses to serve process. The defendant is unable to move forward with his defense when
25 the plaintiff refuses to prosecute the case. The Magistrate Judge has considered less
26 drastic sanctions, but none is apparent. This action has been pending for more than eight
27 months and yet Plaintiff has not effectuated service on Defendant despite being ordered
28 to do so. The Magistrate Judge concludes that the appropriate result is dismissal.

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